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DEPARTMENT OF STATE

OFFICE OF THE LEGAL ADVISER

THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET NAM

March 4, 1966

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THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET NAM

I. THE UNITED STATES AND SOUTH VIET NAM HAVE THE RIGHT UNDER INTERNATIONAL LAW TO PARTICIPATE IN THE COLLECTIVE DEFENSE OF SOUTH VIET NAM AGAINST ARMED ATTACK

In response to requests from the Government of South Viet Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North. This attack has taken the forms of externally supported subversion, clandestine supply of arms, infiltration of armed personnel, and most recently the sending of regular units of the North Vietnamese army into the South.

International law has long recognized the right of individual and collective self-defense against armed attack. South Viet Nam and the United States are engaging in such collective defense consistently with international law and with United States obligations under the United Nations Charter.

A. South Viet Nam is Being Subjected to Armed Attack by Communist North Viet Nam

The Geneva Accords of 1954 established a demarcation line between North Viet Nam and South Viet Nam. They

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provided for withdrawals of military forces into the respective zones north and south of this line. The Accords prohibited the use of either zone for the resumption of hostilities or to "further an aggressive policy".

During the five years following the Geneva Conference of 1954, the Hanoi regime developed a covert political-military organization in South Viet Nam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva Accords. The activities of this covert organization were directed toward the kidnapping and assassination of civilian officials -- acts of terrorism that were perpetrated in increasing numbers.

In the three-year period from 1959 to 1961, the North Viet Nam regime infiltrated an estimated 10,000 men into the South. It is estimated that 13,000 additional personnel were infiltrated in 1962, and, by the end of 1964, North Viet Nam may well have moved over 40,000 armed and unarmed guerrillas into South Viet Nam.

The International Control Commission reported in 1962 the findings of its Legal Committee:

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> ..."there is evidence to show that arms, armed and unarmed personnel, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the objective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South.
>
> ..."there is evidence that the PAVN [People's Army of Viet Nam] has allowed the Zone in the North to be used for inciting, encouraging and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South."

Beginning in 1964, the Communists apparently exhausted their reservoir of southerners who had gone North. Since then the greater number of men infiltrated into the South have been native-born North Vietnamese. Most recently, Hanoi has begun to infiltrate elements of the North Vietnamese army in increasingly larger numbers. Today, there is evidence that nine regiments of regular North Vietnamese forces are fighting in organized units in the South.

In the guerrilla war in Viet Nam, the external aggression from the North is the critical military element of the insurgency, although it is unacknowledged by North Viet Nam. In these circumstances, an "armed attack" is not as easily fixed by date and hour as in the case of

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traditional warfare. However, the infiltration of thousands of armed men clearly constitutes an "armed attack" under any reasonable definition. There may be some question as to the exact date at which North Viet Nam's aggression grew into an "armed attack", but there can be no doubt that it had occurred before February 1965.

B. International Law Recognizes the Right of Individual and Collective Self-Defense Against Armed Attack

International law had traditionally recognized the right of self-defense against armed attack. This proposition has been asserted by writers on international law through the several centuries in which the modern law of nations has developed. The proposition has been acted on numerous times by governments throughout modern history. Today the principle of self-defense against armed attack is universally recognized and accepted.[1/]

The Charter of the United Nations, concluded at the end of World War II, imposed an important limitation on

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1/ See, e.g., Jessup, A Modern Law of Nations, 163 ff. (1948); Oppenheim, International Law, 297 ff. (8th ed., Lauterpacht, 1955). And see, generally, Bowett, Self-Defense in International Law (1958).

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the use of force by United Nations Members. Article 2, paragraph 4, provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

In addition, the Charter embodied a system of international peacekeeping through the organs of the United Nations. Article 24 summarizes these structural arrangements in stating that the United Nations Members--

> "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

However, the Charter expressly states in Article 51 that the remaining provisions of the Charter -- including the limitation of Article 2, paragraph 4, and the creation of United Nations machinery to keep the peace -- in no way diminish the inherent right of self-defense against armed attack. Article 51 provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to

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> maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Thus, Article 51 restates and preserves, for Member States in the situations covered by the Article, a long-recognized principle of international law. The Article is a "saving clause" designed to make clear that no other provision in the Charter shall be interpreted to impair the inherent right of self-defense referred to in Article 51.

Three principal objections have been raised against the availability of the right of individual and collective self-defense in the case of Viet Nam: (1) that this right applies only in the case of an armed attack on a United Nations Member; (2) that it does not apply in the case of South Viet Nam because the latter is not an independent sovereign state; and (3) that collective self-defense may be undertaken only by a regional organization operating under Chapter VIII of the United Nations Charter. These objections will now be considered in turn.

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C. The Right of Individual and Collective Self-Defense Applies in the Case of South Viet Nam Whether or Not that Country is a Member of the United Nations

1. South Viet Nam enjoys the right of self-defense

The argument that the right of self-defense is available only to Members of the United Nations mistakes the nature of the right of self-defense and the relationship of the United Nations Charter to international law in this respect. As already shown, the right of self-defense against armed attack is an inherent right under international law. The right is not conferred by the Charter, and, indeed, Article 51 expressly recognizes that the right is inherent.

The Charter nowhere contains any provision designed to deprive non-Members of the right of self-defense against armed attack.[2/] Article 2, paragraph 6, does charge the

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2/ While non-Members, such as South Viet Nam, have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, it should be recognized that much of the substantive law of the Charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the Charter provisions bearing on the use of force. Moreover, in the case of South Viet Nam, the South Vietnamese Government has expressed its ability and willingness to abide by the Charter, in applying for United Nations membership. Thus it seems entirely appropriate to appraise the actions of South Viet Nam in relation to the legal standards set forth in the United Nations Charter.

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United Nations with responsibility for ensuring that non-Member States act in accordance with United Nations "Principles so far as may be necessary for the maintenance of international peace and security". Protection against aggression and self-defense against armed attack are important elements in the whole Charter scheme for the maintenance of international peace and security. To deprive non-Members of their inherent right of self-defense would not accord with the Principles of the Organization, but would instead be prejudicial to the maintenance of peace. Thus Article 2, paragraph 6 -- and, indeed, the rest of the Charter -- should certainly not be construed to nullify or diminish the inherent defensive rights of non-Members.

2. The United States has the right to assist in the defense of South Viet Nam although the latter is not a United Nations Member

The cooperation of two or more international entities in the defense of one or both against armed attack is generally referred to as collective self-defense. United States participation in the defense of South Viet Nam at the latter's request is an example of collective self-defense.

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The United States is entitled to exercise the right of individual or collective self-defense against armed attack, as that right exists in international law, subject only to treaty limitations and obligations undertaken by this country.

It has been urged that the United States has no right to participate in the collective defense of South Viet Nam because Article 51 of the United Nations Charter speaks only of the situation "if an armed attack occurs against a Member of the United Nations". This argument is without substance.

In the first place, Article 51 does not impose restrictions or cut down the otherwise available rights of United Nations Members. By its own terms, the Article preserves an inherent right. It is, therefore, necessary to look elsewhere in the Charter for any obligation of Members restricting their participation in collective defense of an entity that is not a United Nations Member.

Article 2, paragraph 4, is the principal provision of the Charter imposing limitations on the use of force by Members. It states that they--

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> "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Action taken in defense against armed attack cannot be characterized as falling within this proscription. The record of the San Francisco Conference makes clear that Article 2, paragraph 4, was not intended to restrict the right of self-defense against armed attack.[3/]

One will search in vain for any other provision in the Charter that would preclude United States participation in the collective defense of a non-Member. The fact that Article 51 refers only to armed attack "against a Member of the United Nations" implies no intention to preclude Members from participating in the defense of non-Members. Any such result would have seriously detrimental consequences for international peace and security and would be inconsistent with the Purposes of the United Nations as they are set

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3/ See, e.g., 6 UNCIO Documents 459.

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forth in Article 1 of the Charter.[4/] The right of Members to participate in the defense of non-Members is upheld by leading authorities on international law.[5/]

D. The Right of Individual and Collective Self-Defense Applies Whether or Not South Viet Nam is Regarded as an Independent Sovereign State

1. South Viet Nam enjoys the right of self-defense

It has been asserted that the conflict in Viet Nam is "civil strife" in which foreign intervention is forbidden.

4/ In particular, the statement of the first Purpose:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;".

5/ Bowett, Self-Defense in International Law, 193-195 (1958); Goodhart, "The North Atlantic Treaty of 1949," 79 Recueil Des Cours, 183, 202-204 (1951, vol. II), quoted in 5 Whiteman's Digest of International Law, 1067-1068 (1965); Kelsen, The Law of the United Nations, 793 (1950); see Stone, Aggression and World Order, 44 (1958).

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Those who make this assertion have gone so far as to compare Ho Chi Minh's actions in Viet Nam with the efforts of President Lincoln to preserve the Union during the American Civil War. Any such characterization is an entire fiction disregarding the actual situation in Viet Nam. The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority.

The Geneva Accords of 1954 provided for a division of Viet Nam into two zones at the 17th parallel. Although this line of demarcation was intended to be temporary, it was established by international agreement, which specifically forbade aggression by one zone against the other.

The Republic of Viet Nam in the South has been recognized as a separate international entity by approximately sixty governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations. The United Nations General Assembly in 1957 voted to recommend South Viet Nam for membership in the Organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council.

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In any event there is no warrant for the suggestion that one zone of a temporarily divided state -- whether it be Germany, Korea, or Viet Nam -- can be legally overrun by armed forces from the other zone, crossing the internationally recognized line of demarcation between the two. Any such doctrine would subvert the international agreement establishing the line of demarcation, and would pose grave dangers to international peace.

The action of the United Nations in the Korean conflict of 1950 clearly established the principle that there is no greater license for one zone of a temporarily divided state to attack the other zone than there is for one state to attack another state. South Viet Nam has the same right that South Korea had to defend itself and to organize collective defense against an armed attack from the North. A resolution of the Security Council dated June 25, 1950 noted "with grave concern the armed attack upon the Republic of Korea by forces from North Korea" and determined "that this action constitutes a breach of the peace".

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2. The United States is entitled to participate in the collective defense of South Viet Nam whether or not the latter is regarded as an independent sovereign state

As stated earlier, South Viet Nam has been recognized as a separate international entity by approximately sixty governments. It has been admitted to membership in a number of the United Nations specialized agencies, and has been excluded from the United Nations Organization only by the Soviet veto.

There is nothing in the Charter to suggest that United Nations Members are precluded from participating in the defense of a recognized international entity against armed attack merely because the entity may lack some of the attributes of an independent sovereign state. Any such result would have a destructive effect on the stability of international engagements such as the Geneva Accords of 1954 and on internationally agreed lines of demarcation. Such a result, far from being in accord with the Charter and the Purposes of the United Nations, would undermine them and would create new dangers to international peace and security.

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E. The United Nations Charter Does Not Limit the Right of Self-Defense to Regional Organizations

Some have argued that collective self-defense may be undertaken only by a regional arrangement or agency operating under Chapter VIII of the United Nations Charter. Such an assertion ignores the structure of the Charter and the practice followed in the more than twenty years since the founding of the United Nations.

The basic proposition that rights of self-defense are not impaired by the Charter -- as expressly stated in Article 51 -- is not conditioned by any Charter provision limiting the application of this proposition to collective defense by a regional arrangement or agency. The structure of the Charter reinforces this conclusion. Article 51 appears in Chapter VII of the Charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression", whereas Chapter VIII, entitled "Regional Arrangements", begins with Article 52 and embraces the two following articles. The records of the San Francisco Conference show that Article 51 was deliberately

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placed in Chapter VII rather than Chapter VIII, "where it would only have a bearing on the regional system."[6/]

Under Article 51, the right of self-defense is available against any armed attack, whether or not the country attacked is a member of a regional arrangement and regardless of the source of the attack. Chapter VIII, on the other hand, deals with relations among members of a regional arrangement or agency, and authorizes regional action as appropriate for dealing with "local disputes". This distinction has been recognized ever since the founding of the United Nations in 1945.

For example, the North Atlantic Treaty has operated as a collective security arrangement, designed to take common measures in preparation against the eventuality of an armed attack for which collective defense under Article 51 would be required. Similarly, the Southeast Asia Treaty Organization was designed as a collective defense arrangement under Article 51. Secretary of State Dulles emphasized

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6/ 17 UNCIO Documents 288.

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this in his testimony before the Senate Foreign Relations Committee in 1954.

By contrast, Article 1 of the Charter of Bogota (1948), establishing the Organization of American States, expressly declares that the Organization is a regional agency within the United Nations. Indeed, Chapter VIII of the United Nations Charter was included primarily to take account of the functioning of the Inter-American System.

In sum, there is no basis in the United Nations Charter for contending that the right of self-defense against armed attack is limited to collective defense by a regional organization.

F. The United States Has Fulfilled its Obligations to the United Nations

A further argument has been made that the Members of the United Nations have conferred on United Nations organs--and, in particular, on the Security Council -- exclusive power to act against aggression. Again, the express language of Article 51 contradicts that assertion. A victim of armed attack is not required to forgo individual or collective defense of its territory until such time as

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the United Nations organizes collective action and takes appropriate measures. To the contrary, Article 51 clearly states that the right of self-defense may be exercised "until the Security Council has taken the measures necessary to maintain international peace and security."7/

As indicated earlier, Article 51 is not literally applicable to the Viet Nam situation since South Viet Nam is not a Member. However, reasoning by analogy from Article 51 and adopting its provisions as an appropriate guide for the conduct of Members in a case like Viet Nam, one can only conclude that United States actions are fully in accord with this country's obligations as a Member of the United Nations.

7/ An argument has been made by some that the United States, by joining in the collective defense of South Viet Nam, has violated the peaceful settlement obligation of Article 33 in the Charter. This argument overlooks the obvious proposition that a victim of armed aggression is not required to sustain the attack undefended while efforts are made to find a political solution with the aggressor. Article 51 of the Charter illustrates this by making perfectly clear that the inherent right of self-defense is impaired by "Nothing in the present Charter", including the provisions of Article 33.

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Article 51 requires that:

> "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The United States has reported to the Security Council on measures it has taken in countering the Communist aggression in Viet Nam. In August 1964 the United States asked the Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf. The Council thereafter met to debate the question, but adopted no resolutions. Twice in February 1965 the United States sent additional reports to the Security Council on the conflict in Viet Nam and on the additional measures taken by the United States in the collective defense of South Viet Nam. In January 1966 the United States formally submitted the Viet Nam question to the Security Council for its consideration and introduced a draft resolution calling for discussions looking toward a peaceful settlement on the basis of the Geneva Accords.

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At no time has the Council taken any action to restore peace and security in Southeast Asia. The Council has not expressed criticism of United States actions. Indeed, since the United States submission of January 1966, Members of the Council have been notably reluctant to proceed with any consideration of the Viet Nam question.

The conclusion is clear that the United States has in no way acted to interfere with United Nations consideration of the conflict in Viet Nam. On the contrary, the United States has requested United Nations consideration, and the Council has not seen fit to act.

G. International Law Does Not Require a Declaration of War as a Condition Precedent to Taking Measures of Self-Defense Against Armed Attack

The existence or absence of a formal declaration of war is not a factor in determining whether an international use of force is lawful as a matter of international law. The United Nations Charter's restrictions focus on the manner and purpose of its use and not on any formalities of announcement.

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It should also be noted that a formal declaration of war would not place any obligations on either side in the conflict by which that side would not be bound in any event. The rules of international law concerning the conduct of hostilities in an international armed conflict apply regardless of any declaration of war.

H. Summary

The analysis set forth above shows that South Viet Nam has the right in present circumstances to defend itself against armed attack from the North and to organize a collective self-defense with the participation of others. In response to requests from South Viet Nam, the United States has been participating in that defense, both through military action within South Viet Nam and actions taken directly against the aggressor in North Viet Nam. This participation by the United States is in conformity with international law and is consistent with our obligations under the Charter of the United Nations.

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II. THE UNITED STATES HAS UNDERTAKEN COMMITMENTS TO ASSIST SOUTH VIET NAM IN DEFENDING ITSELF AGAINST COMMUNIST AGGRESSION FROM THE NORTH

The United States has made commitments and given assurances, in various forms and at different times, to assist in the defense of South Viet Nam.

A. The United States Gave Undertakings at the End of the Geneva Conference in 1954

At the time of the signing of the Geneva Accords in 1954, President Eisenhower warned "that any renewal of Communist aggression would be viewed by us as a matter of grave concern", at the same time giving assurance that the United States would "not use force to disturb the settlement". And the formal declaration made by the United States Government at the conclusion of the Geneva Conference stated that the United States "would view any renewal of aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security".

B. The United States Undertook an International Obligation to Defend South Viet Nam in the SEATO Treaty

Later in 1954 the United States negotiated with a number of other countries and signed the Southeast Asia

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Collective Defense Treaty. The Treaty contains in the first paragraph of Article 4 the following provision:

> "Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations."

Annexed to the Treaty was a Protocol stating that:

> "The parties to the Southeast Asia Collective Defense Treaty unanimously designate for the purpose of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Viet Nam."

Thus, the obligations of Article IV, paragraph 1, dealing with the eventuality of armed attack, have from the outset covered the territory of South Viet Nam. The facts as to the North Vietnamese armed attack against the South have been summarized earlier, in the discussion of the right of self-defense under international law and the Charter of the United Nations. The term "armed attack" has the same meaning in the SEATO Treaty as in the United Nations Charter.

Article IV, paragraph 1, places an obligation on each party to the SEATO Treaty to "act to meet the common danger

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in accordance with its constitutional processes" in the event of an armed attack. The Treaty does not require a collective determination that an armed attack has occurred in order that the obligation of Article IV, paragraph 1, become operative. Nor does the provision require collective decision on actions to be taken to meet the common danger. As Secretary Dulles pointed out when transmitting the Treaty to the President, the commitment in Article IV, paragraph 1, "leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs."

The Treaty was intended to deter armed aggression in Southeast Asia. To that end it created not only a multilateral alliance but also a series of bilateral relationships. The obligations are placed squarely on "each Party" in the event of armed attack in the Treaty area -- not upon "the Parties", a wording that might have implied a necessity for collective decision. The Treaty was intended to give the assurance of United States assistance to any Party or protocol state that might suffer a Communist armed attack, regardless of the views or actions of other parties. The fact that the obligations are individual, and may even to

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some extent differ among the parties to the Treaty, is demonstrated by the United States understanding, expressed at the time of signature, that its obligations under Article IV, paragraph 1, apply only in the event of Communist aggression, whereas the other parties to the Treaty were unwilling so to limit their obligations to each other.

Thus, the United States has a commitment under Article IV, paragraph 1, in the event of armed attack, independent of the decision or action of other treaty parties. A joint communiqué issued by Secretary Rusk and Foreign Minister Thanat Khoman of Thailand on March 6, 1962, reflected this understanding:

> "The Secretary of State assured the Foreign Minister that in the event of such aggression, the United States intends to give full effect to its obligations under the Treaty to act to meet the common danger in accordance with its constitutional processes. The Secretary of State reaffirmed that this obligation of the United States does not depend on the prior agreement of all other Parties to the Treaty, since this Treaty obligation is individual as well as collective."

Most of the SEATO countries have stated that they agreed with this interpretation. None has registered objection to it.

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When the Senate Committee on Foreign Relations reported on the Southeast Asia Collective Defense Treaty, it noted that the treaty area was further defined so that the "Free Territory of Viet Nam" was an area "which, if attacked, would fall under the protection of the instrument". In its conclusion the Committee stated:

> "The Committee is not impervious to the risks which this treaty entails. It fully appreciates that acceptance of these additional obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests."

The Senate gave its advice and consent to the Treaty by a vote of 82 to 1.

C. <u>The United States Has Given Additional Assurances to the Government of South Viet Nam</u>

The United States has also given a series of additional assurances to the Government of South Viet Nam. As early as October 1954 President Eisenhower undertook to provide direct assistance to help make South Viet Nam "capable of resisting attempted subversion or aggression through military means". On May 11, 1957 President Eisenhower and President Ngo Dinh Diem of the Republic of Viet Nam issued a joint

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112 Cong. Rec. (daily ed. Feb 9, 1966)

statement which called attention to "the large build-up of Vietnamese Communist military forces in North Viet Nam" and stated:

> "Noting that the Republic of Vietnam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability."

On August 2, 1961 President Kennedy declared that "the United States is determined that the Republic of Viet Nam shall not be lost to the Communists for lack of any support which the United States can render". On December 7 of that year President Diem appealed for additional support. In his reply of December 14, 1961 President Kennedy recalled the United States declaration made at the end of the Geneva Conference in 1954, and reaffirmed that the United States was "prepared to help the Republic of Viet Nam to protect its people and to preserve its independence." This assurance has been reaffirmed many times since.

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III. ACTIONS BY THE UNITED STATES AND SOUTH VIET NAM ARE JUSTIFIED UNDER THE GENEVA ACCORDS OF 1954

A. Description of the Accords

The Geneva Accords of 1954[8/] established the date and hour for a cease-fire in Viet Nam, drew a "provisional military demarcation line" with a demilitarized zone on both sides, and required an exchange of prisoners and the phased regroupment of Viet Minh Forces from the south to the north and of French Union Forces from the north to the south. The introduction into Viet Nam of troops reinforcements and new military equipment (except for replacement and repair) was prohibited. The armed forces of each party were required to respect the demilitarized zone and the territory of the other zone. The adherence of either zone to any military alliance, and the use of either zone for the resumption of hostilities or to "further an aggressive policy", were prohibited. The

8/ These Accords were composed of a bilateral cease-fire agreement between the "Commander-in-Chief of the People's Army of Viet Nam" and the "Commander-in-Chief of the French Union Forces in Indo-China", together with a Final Declaration of the Conference, to which France adhered. However, it is to be noted that the South Vietnamese Government was not a signatory of the cease-fire agreement and did not adhere to the Final Declaration. South Viet Nam entered a series of reservations in a statement to the Conference. This statement was noted by the Conference, but by decision of the Conference Chairman it was not included or referred to in the Final Declaration.

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International Control Commission was established, composed of India, Canada and Poland, with India as Chairman. The task of the Commission was to supervise the proper execution of the provisions of the Cease-Fire Agreement. General elections that would result in reunification were required to be held in July 1956 under the supervision of the ICC.

B. North Viet Nam Violated the Accords from the Beginning

From the very beginning, the North Vietnamese violated the 1954 Geneva Accords. Communist military forces and supplies were left in the South in violation of the Accords. Other Communist guerrillas were moved north for further training and then were infiltrated into the South in violation of the Accords.

C. The Introduction of United States Military Personnel and Equipment was Justified

The Accords prohibited the reinforcement of foreign military forces in Viet Nam and the introduction of new military equipment, but they allowed replacement of existing military personnel and equipment. Prior to late 1961 South Viet Nam had received considerable military equipment and supplies from the United States, and the United States

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had gradually enlarged its Military Assistance Advisory Group to slightly less than 900 men. These actions were reported to the ICC and were justified as replacements for equipment in Viet Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954.

As the Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communist terrorism in the South, the United States found it necessary in late 1961 to increase substantially the numbers of our military personnel and the amounts and types of equipment introduced by this country into South Viet Nam. These increases were justified by the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related

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provision until the defaulting party is prepared to honor its obligations.[9/]

In accordance with this principle, the systematic violation of the Geneva Accords by North Viet Nam justified South Viet Nam in suspending compliance with the provision controlling entry of foreign military personnel and military equipment.

9/ This principle of law and the circumstances in which it may be invoked are most fully discussed in the Fourth Report on the Law of Treaties by Sir Gerald Fitzmaurice, Articles 18, 20 (UN Doc. A/CN.4/120(1959)) II Yearbook of the International Law Commission 37 (UN Doc. A/CN.4/SER.A/1959/Add.1) and in the later Report by Sir Humphrey Waldock, Article 20 (UN Doc. A/CN.4/156 and Add.1-3 (1963)) II Yearbook of the International Law Commission 36 (UN Doc. A/CN.4/SER.A/1963/Add.1). Among the authorities cited by the Fourth Report for this proposition are: II Oppenheim, International Law 136, 137 (7th ed. Lauterpacht 1955); I Rousseau, Principes généraux du droit international public 365 (1944); II Hyde, International Law 1660 et.seq.(2d ed. 1947); II Guggenheim, Traité de droit international public 84, 85 (1935); Spiropoulos, Traité théorique et pratique de droit international public 289 (1933); Verdross, Völkerrecht, 328 (1950); Hall, Treatise 21 (8th ed. Higgins 1924); 3 Accioly, Tratado de Direito Internacional Publico 82 (1956-57). See also draft articles 42 and 46 of the Law of Treaties by the International Law Commission, contained in the Report on the work of its Fifteenth Session (General Assembly, Official Records, 18th Session, Supplement No. 9(A/5809)).

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D. South Viet Nam was Justified in Refusing to Implement the Election Provisions of the Geneva Accords

The Geneva Accords contemplated the reunification of the two parts of Viet Nam. They contained a provision for general elections to be held in July 1956 in order to obtain a "free expression of the national will". The Accords stated that "consultations will be held on this subject between the competent representative authorities of the two zones from 20 July 1955 onwards".

There may be some question whether South Viet Nam was bound by these election provisions. As indicated earlier, South Viet Nam did not sign the cease-fire agreement of 1954, nor did it adhere to the Final Declaration of the Geneva Conference. The South Vietnamese Government at that time gave notice of its objection in particular to the election provisions of the Accords.

However, even on the premise that these provisions were binding on South Viet Nam, the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of

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obligation. The conditions in North Viet Nam during that period were such as to make impossible any free and meaningful expression of popular will.

Some of the facts about conditions in the North were admitted even by the Communist leadership in Haoi. General Giap, currently Defense Minister of North Viet Nam, in addressing the Tenth Congress of the North Vietnamese Communist Party in October 1956, publicly acknowledged that the Communist leaders were running a police state where executions, terror and torture were commonplace. A nationwide election in these circumstances would have been a travesty. No one in the North would have dared to vote except as directed. With a substantial majority of the Vietnamese people living north of the 17th parallel, such an election would have meant turning the country over to the Communists without regard to the will of the people. The South Vietnamese Government realized these facts and quite properly took the position that consultations for elections in 1956 as contemplated by the Accords would be a useless formality. 10/

10/ In any event, if North Viet Nam considered there had been a breach of obligation by the South, its remedies lay in discussion with Saigon, perhaps in an appeal to the Co-Chairmen of the Geneva Conference, or in a reconvening of the Conference to consider the situation. Under international law, North Viet Nam had no right to use force outside its own zone in order to secure its political objectives.

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IV. THE PRESIDENT HAS FULL AUTHORITY TO COMMIT UNITED STATES FORCES IN THE COLLECTIVE DEFENSE OF SOUTH VIET NAM

There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet Nam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Viet Nam. In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Viet Nam. These actions rest not only on the exercise of Presidential powers under Article II but on the SEATO Treaty -- a treaty advised and consented to by the Senate -- and on actions of the Congress, particularly the Joint Resolution of August 10, 1964. When these sources of authority are taken together -- Article II of the Constitution, the SEATO Traaty, and actions by the Congress -- there can be no question of the legality under domestic law of United States actions in Viet Nam.

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A. The President's Power Under Article II of the Constitution Extends to the Actions Currently Undertaken in Viet Nam

Under the Constitution, the President, in addition to being Chief Executive, is Commander-in-Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power "to make war". There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute "to declare war" for "to make war", "leaving to the Executive the power to repel sudden attacks". It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote.

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In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO Treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and safety of the United States.

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the "undeclared war" with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean War of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences

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so threatening to the security of the United States that he should act without formally consulting the Congress.

B. The Southeast Asia Collective Defense Treaty Authorizes the President's Actions

Under Article VI of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land". Article IV, paragraph 1 of the SEATO Treaty establishes as a matter of law that a Communist armed attack against South Viet Nam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO Treaty to "act to meet the common danger in accordance with its constitutional processes" in the event of such an attack.

Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U. S. forces to South Viet Nam is required, and that

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military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures.

The SEATO Treaty specifies that each party will act "in accordance with its constitutional processes".

It has recently been argued that the use of land forces in Asia is not authorized under the Treaty because their use to deter armed attack was not contemplated at the time the Treaty was considered by the Senate. Secretary Dulles testified at that time that we did not intend to establish (1) a land army in Southeast Asia capable of deterring Communist aggression, or (2) an integrated headquarters and military organization like that of NATO; instead, the United States would rely on "mobile striking power" against the sources of aggression. However, the Treaty obligation in Article IV, paragraph 1, to meet the common danger in the event of armed aggression, is not limited to particular modes of military action. What constitutes an adequate deterrent or an appropriate response, in terms of military strategy, may change; but the essence

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of our commitment to act to meet the common danger, as necessary at the time of an armed aggression, remains. In 1954 the forecast of military judgment might have been against the use of substantial United States ground forces in Viet Nam. But that does not preclude the President from reaching a different military judgment in different circumstances, twelve years later.

C. The Joint Resolution of Congress of August 10, 1964 Authorizes United States Participation in the Collective Defense of South Viet Nam

As stated earlier, the legality of United States participation in the defense of South Viet Nam does not rest only on the constitutional power of the President under Article II -- or indeed on that power taken in conjunction with the SEATO Treaty. In addition, the Congress has acted in unmistakable fashion to approve and authorize United States actions in Viet Nam.

Following the North Vietnamese attacks in the Gulf of Tonkin against United States destroyers, Congress adopted, by a Senate vote of 88-2 and a House vote of 416-0, a Joint Resolution containing a series of important declarations and provisions of law.

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Section 1 resolved that "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression". Thus, the Congress gave its sanction to specific actions by the President to repel attacks against United States naval vessels in the Gulf of Tonkin and elsewhere in the western Pacific. Congress further approved the taking of "all necessary measures... to prevent further aggression". This authorization extended to those measures the President might consider necessary to ward off further attacks and to prevent further aggression by North Viet Nam in Southeast Asia.

The Joint Resolution then went on to provide in section 2:

> "The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom".

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Section 2 thus constitutes an authorization to the President, in his discretion, to act -- using armed force if he determines that is required -- to assist South Viet Nam at its request in defense of its freedom. The identification of South Viet Nam through the reference to "protocol state" in this section is unmistakable, and the grant of authority "as the President determines" is unequivocal.

It has been suggested that the legislative history of the Joint Resolution shows an intention to limit United States assistance to South Viet Nam to aid, advice, and training. This suggestion is based on an amendment offered from the floor by Senator Nelson which would have added the following to the text:

> "The Congress also approves and supports the efforts of the President to bring the problem of peace in Southeast Asia to the Security Council of the United Nations, and the President's declaration that the United States, seeking no extension of the present military conflict, will respond to provocation in a manner that is 'limited and fitting'. Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice, and it is the sense of Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southeast Asian conflict". 11/

11/ 110 CONG. REC. 18459 (August 7, 1964).

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Senator Fulbright, who had reported the Joint Resolution from the Foreign Relations Committee, spoke on the amendment as follows:

> "Mr. Fulbright. It states fairly accurately what the President has said would be our policy, and what I stated my understanding was as to our policy; also what other Senators have stated. In other words, it states that our response should be appropriate and limited to the provocation, which the Senator states as 'respond to provocation in a manner that is limited and fitting', and so forth. We do not wish any political or military bases there. We are not seeking to gain a colony. We seek to insure the capacity of these people to develop along the lines of their own desires, independent of domination by communism.
>
> "The Senator has put into his amendment a statement of policy that is unobjectionable. However, I cannot accept the amendment under the circumstances. I do not believe it is contrary to the joint resolution, but it is an enlargement. I am informed that the House is now voting on this resolution. The House joint resolution is about to be presented to us. I cannot accept the amendment and go to conference with it, and thus take responsibility for delaying matters.
>
> "I do not object to it as a statement of policy. I believe it is an accurate reflection of what I believe is the President's policy, judging from his own statements. That does not mean that as a practical matter I can accept the amendment. It would delay matters to do so. It would cause confusion and require a conference, and present us

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with all the other difficulties that are involved in this kind of legislative action. I regret that I cannot do it, even though I do not at all disagree with the amendment as a general statement of policy".12/

Senator Nelson's amendment related the degree and kind of U. S. response in Viet Nam to "provocation" on the other side; the response should be "limited and fitting". The greater the provocation, the stronger are the measures that may be characterized as "limited and fitting". Bombing of North Vietnamese naval bases was a "limited and fitting" response to the attacks on U. S. destroyers in August 1964, and the subsequent actions taken by the United States and South Viet Nam have been an appropriate response to the increased war of aggression carried on by North Viet Nam since that date. Moreover, Senator Nelson's proposed amendment did not purport to be a restriction on authority available to the President but merely a statement concerning what should be the continuing policy of the United States.

Congressional realization of the scope of authority being conferred by the Joint Resolution is shown by the legislative history of the measure as a whole. The following exchange between Senators Cooper and Fulbright is

12/ Ibid.

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illuminating:

"Mr. Cooper... The Senator will remember that the SEATO Treaty, in article IV, provides that in the event an armed attack is made upon a party to the Southeast Asia Collective Defense Treaty, or upon one of the protocol states such as South Vietnam, the parties to the treaty, one of whom is the United States, would then take such action as might be appropriate, after resorting to their constitutional processes. I assume that would mean, in the case of the United States, that Congress would be asked to grant the authority to act.

"Does the Senator consider that in enacting this resolution we are satisfying that requirement of article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

" Mr. Fulbright. I think that is correct.

"Mr. Cooper. Then,looking ahead, if the President deciced that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

"Mr. Fulbright. That is the way I would interpret it. If a situation later developed in

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which we thought the approval should be withdrawn it could be withdrawn by concurrent resolution." 13/

13/ 110 CONG. REC. 18409 (August 6 1964.)

Senator Morse, who opposed the Joint Resolution, expressed the following view on August 6, 1964, concerning the scope of the proposed resolution:

> "Another Senator thought, in the early part of the debate, that this course would not broaden the power of the President to engage in a land war if he decided that he wanted to apply the resolution in that way.
>
> "That Senator was taking great consolation in the then held belief that, if he voted for the resolution, it would give no authority to the President to send many troops into Asia. I am sure he was quite disappointed to finally learn, because it took a little time to get the matter cleared, that the resolution places no restriction on the President in that respect. If he is still in doubt, let him read the language on page 2, lines 3 to 6, and page 2, lines 11 to 17. The first reads:
>
> > 'The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.'
>
> "It does not say he is limited in regard to the sending of ground forces. It does not limit that authority. That is why I have called it a predated declaration of war, in clear violation of article I, section 8 of the Constitution, which vests the power to declare war in the Congress, and not in the President.
>
> "What is proposed is to authorize the President of the United States, without a declaration of war, to commit acts of war". 110 CONG. REC. 18426-7 (August 6, 1964)

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The August 1964 Joint Resolution continues in force today. Section 2 of the Resolution provides that it shall expire "when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress". The President has made no such determination, nor has Congress terminated the Joint Resolution.[14/]

Instead, Congress in May 1965 approved an appropriation of $700 million to meet the expense of mounting military requirements in Viet Nam. (Public Law 89-18, 79 Stat. 109) The President's message asking for this appropriation stated that this was "not a routine request. For each member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggressions in South Viet Nam". The Appropriation Act constitutes a clear Congressional endorsement and approval of the actions taken by the President.

14/ On March 1, 1966, the Senate voted, 92-5, to table an amendment that would have repealed the Joint Resolution.

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On March 1, 1966 the Congress continued to express its support of the President's policy by approving a $4.8 billion supplemental military authorization by votes of 392-4 and 93-2. An amendment that would have limited the President's authority to commit forces to Viet Nam was rejected in the Senate by a vote of 94-2.

D. No Declaration of War by the Congress is Required to Authorize United States Participation in the Collective Defense of South Viet Nam

No declaration of war is needed to authorize American actions in Viet Nam. As shown in the preceding sections, the President has ample authority to order the participation of United States armed forces in the defense of South Viet Nam.

Over a very long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war. This history extends from the undeclared war with France and the war against the Barbary Pirates, at the end of the 18th century, to the Korean War of 1950-53.

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James Madison, one of the leading framers of the Constitution, and Presidents John Adams and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any Congressional declaration of war. Their views and actions constitute highly persuasive evidence as to the meaning and effect of the Constitution. History has accepted the interpretation that was placed on the Constitution by the early Presidents and Congresses in regard to the lawfulness of hostilities without a declaration of war. The instances of such action in our history are numerous.

In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country -- the United Nations Charter -- recommended assistance to the Republic of Korea against the

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Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Viet Nam we have the obligation of the SEATO Treaty and clear expressions of Congressional support. If the President could act in Korea without a declaration of war, a fortiori he is empowered to do so now in Viet Nam.

It may be suggested that a declaration of war is the only available constitutional process by which Congressional support can be made effective for the use of United States armed forces in combat abroad. But the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to exercise its powers. In the case of Viet Nam the Congress has supported the determination of the President by the Senate's approval of the SEATO Treaty, the adoption of the Joint Resolution of August 10, 1964, and the enactment of the necessary authorizations and appropriations.

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V. CONCLUSION

South Viet Nam is being subjected to armed attack by Communist North Viet Nam, through the infiltration of armed personnel, military equipment and regular combat units. International law recognizes the right of individual and collective self-defense against armed attack. South Viet Nam, and the United States upon the request of South Viet Nam, are engaged in such collective defense of the South. Their actions are in conformity with international law and with the Charter of the United Nations. The fact that South Viet Nam has been precluded by Soviet veto from becoming a Member of the United Nations, and the fact that South Viet Nam is a zone of a temporarily divided state, in no way diminish the right of collective defense of South Viet Nam.

The United States has commitments to assist South Viet Nam in defending itself against Communist aggression from the North. The United States gave undertakings to this effect at the conclusion of the Geneva Conference in 1954. Later that year the United States undertook an international obligation in the SEATO Treaty to defend South Viet Nam

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against Communist armed aggression. And during the past decade the United States has given additional assurances to the South Vietnamese Government.

The Geneva Accords of 1954 provided for a cease-fire and regroupment of contending forces, a division of Viet Nam into two zones, and a prohibition on the use of either zone for the resumption of hostilities or to "further an aggressive policy". From the beginning, North Viet Nam violated the Geneva Accords through a systematic effort to gain control of South Viet Nam by force. In the light of these progressive North Vietnamese violations, the introduction into South Viet Nam beginning in late 1961 of substantial United States military equipment and personnel, to assist in the defense of the South, was fully justified; substantial breach of an international agreement by one side permits the other side to suspend performance of corresponding obligations under the agreement. South Viet Nam was justified in refusing to implement the provisions of the Geneva Accords calling for reunification through free elections throughout Viet Nam since the Communist regime in North Viet Nam created conditions in the North that made free elections entirely impossible.

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The President of the United States has full authority to commit United States forces in the collective defense of South Viet Nam. This authority stems from the Constitutional powers of the President. However, it is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO Treaty -- advised and consented to by the Senate and forming part of the law of the land -- sets forth a United States commitment to defend South Viet Nam against armed attack, and since the Congress -- in the Joint Resolution of August 10, 1964, and in authorization and appropriations acts for support of the U. S. military effort in Viet Nam -- has given its approval and support to the President's actions. United States actions in Viet Nam, taken by the President and approved by the Congress, do not require any declaration of war, as shown by a long line of precedents for the use of United States armed forces abroad in the absence of any Congressional declaration of war.

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